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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1351

EDWARD W. BABIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

		Page
Table of Authorities		ii
OPINIONS BELOW		2
JURISDICTION		2
QUESTIONS PRESENTED		3
STATEMENT OF THE CASE		4
REASONS FOR GRANTING THE WRIT		
I	Refinement of the Dutton Standard is Necessary to Insure a Criminal Defendant's Sixth Amendment Confrontation Rights	6
II	Refinement of the Dutton Standard is Necessary to Resolve Division Among the Circuit Courts	9
III	The Standard for Determination of Reliability Must Be Greater Than Mere Preponderance of the Evidence	12
APPENDIX A		A-1

TABLE OF AUTHORITIES

	Page
Bruton v. United States, 391 U.S. 123 (1968)	6
Dutton v. Evans, 400 U.S. 74 (1970)	6,7,9, 10,11
Hoover v. Beto, 467 F2d 516 (5th Cir. 1972)	10
Puco, United States v., 476 F2d 1099 (2nd Cir. 1973)	10
Roberts, United States v., 583 F2d 1173 (10th Cir. 1978)	10
Snow v. United States, 521 F2d 730 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976)	9,10

LAW REVIEWS

Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harvard Law Review 1328	7
Garland and Snow, The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements, 63 J. Crim. L.C. & P.S. 1, 8 (1972)	12
Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stanford Law Review, 271 (1975)	13
_____, The Supreme Court, 1970 Term, 85 Harvard Law Review 3	7

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

EDWARD W. BABIC, the petitioner herein, prays that a Writ of Certicrari be issued to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on January 31, 1980.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals is not reported. It is printed and attached hereto as Appendix A. The opinion affirms the trial court verdict of guilty of one count of conspiracy to defraud the Internal Revenue Service (IRS), 18 U.S.C. §371; and one count of aiding and assisting the preparation and presentation of fradulent documents to the IRS, 26 U.S.C. §7206(2). Judgment of guilty was entered by the District Court for the Central District of California on December 6, 1978.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on January 31, 1980. Petitioner filed a Motion to Stay Issuance of Mandate pending application for Writ of Certiorari and to continue defendant on bail February 19, 1980. The Motion was granted by the Court of Appeals on February 22, 1980. The jurisdiction of the Supreme Court is based on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether refinement and amplification by this Court of the reliability test set forth in Dutton v. Evans is necessary to preserve a criminal defendant's Sixth Amendment rights.

2. Whether the Sixth Amendment and the "reliability test" of Dutton mandate consideration of the "crucial and devastating" nature of testimony offered under the co-conspirator exception to the hearsay rule.

3. Whether Dutton requires specific findings at trial regarding reliability of the hearsay declarant and the "crucial and devastating" nature of the statements being offered.

4. Whether the government, in a criminal case, must establish reliability of the declarant and his statements by a preponderance of the evidence or some other standard.

STATEMENT OF THE CASE

The tax investigation of Lefkowitz by Special Agents of the Intelligence Division of the Internal Revenue Service commenced on May 14, 1975. The course of that investigation, Commissioner summonses were served upon Lefkowitz and Sullivan--the secretary for several of Lefkowitz's corporations, a co-conspirator, and his girlfriend--with respect to the books and records of several corporations and entities, including N/U Rent a Car. From April of 1975 through June of 1976 defendant Babic, a former Special Agent of the Intelligence Division, was tax counsel and tax advisor to Lefkowitz and some of his entities. Lloyd Martin Fisher was the controller employed by Lefkowitz and the entities.

Negotiations were held with the Special Agents, with a view to supplying the information at a date subsequent to the return date of the summons itself. During the period of delay, Fisher rewrote the records, which were then submitted to the Internal Revenue Service. The original records were maintained at the corporate offices located in Los Angeles, California, and were subsequently moved to the home of Lefkowitz in Granada Hills, California. Information was later received by the Internal Revenue

Service that the records had been rewritten and the original records were possibly available. Search warrants, obtained for the corporate offices and the Lefkowitz residence, were executed on November 17 and 18, 1975, and the original records were seized by the Agents of the Internal Revenue Service.

It is clear that the records in this case were rewritten. As to defendant Babic, the ultimate issue is whether there is sufficient admissible evidence to establish beyond a reasonable doubt that Babic participated in the conspiracy to rewrite and falsify records and submit them to the Internal Revenue Service.

At trial, Sullivan was permitted, over objection, to testify as to statements from Babic to Lefkowitz concerning the destruction of records and the cover-up of the scheme. R.T. 136. None of the alleged statements of Babic were made in the presence of Sullivan and Lefkowitz did not testify.

That these statements were made by Lefkowitz to Sullivan is possible, indeed probable, in view of his (Lefkowitz's) need to assuage the fears of his girlfriend (Sullivan) and maintain her cooperation as a co-conspirator. What better way to accomplish this than by setting up an attorney, Babic, as a source of approval for the scheme.

Because of the nature of the balance of government witnesses at trial, Sullivan's testimony gained significance. Fisher relayed facts and circumstances which were as consistent with Babic's innocence as they were with guilt. Similarly, the Internal Revenue Service Agents could not confirm Babic's participation. In this sense, Sullivan's testimony, if believed, presented the most "crucial and devastating" kind of evidence against Babic.

The trial court convicted Babic of two counts and the decision was upheld in rather summary fashion by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I

REFINEMENT OF THE DUTTON STANDARD IS NECESSARY TO INSURE A CRIMINAL DEFENDANT'S SIXTH AMENDMENT CONFRONTATION RIGHTS

In Dutton v. Evans, 400 U.S. 74 (1970) this Court addressed the issue left unanswered in Bruton v. United States, 391 U.S. 123 (1968): whether a statement admissible under the co-conspirator exception to the hearsay rule poses a threat to a criminal

defendant's confrontation right if the declarant does not testify. The plurality decision focused on three factors deemed by the Court to supplant the defendant's opportunity to confront the declarant. The factors include: reliability; the "crucial" nature of the statement, or its necessity to the proceedings; and the "devastating" nature of the statement, or its prejudice to the defendant. 400 U.S. 88-89.

Commentators, in general, feel that the time has come for this Court to refine its factor test. The Supreme Court, 1970 Term, 85 Harvard Law Review 3, 199. It is speculated that, in Dutton, this Court purposefully left the door wide open for interpretation and expansion by the circuit courts. Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harvard Law Review 1328, 1381. In the 10 years since the decision, few courts have accepted the invitation. Now is the time for review by this Court.

It has been asserted that a "due process" type balancing was intended by this Court. The more crucial a statement is to the prosecution's case, or the more devastating admission of the statement is to the defendant, the greater the standard of reliability required for admission of the statement. 85 Harvard Law Review 197.

If that is the case, the dissent position articulated by Justice Marshall gains new significance. It was his view that, post balancing, a co-conspirator's statement will almost always be prejudicial and that reliability can be assured only by cross-examination of the declarant. Simply, where the declarant does not testify these statements should be excluded regardless of necessity.

The impact of clarification on the case at bar is tremendous. Here, the most "crucial" and "devastating" testimony at trial came in the form of double hearsay--statements alleged to have been made by Babic to Lefkowitz and then repeated to Sullivan, the testifying co-conspirator. The impact of Sullivan's testimony was heightened by the absence of Lefkowitz for purposes of cross-examination.

By virtue of the fact that Lefkowitz did not take the stand, the reliability of his statements to Sullivan went untested. This fact becomes increasingly significant in light of Lefkowitz's high motive for fabrication. What better way to keep the support and ease the trepidations of a co-conspirator (Sullivan) than to sanction the conduct with imagined words from his attorney (Babic). Such motivation becomes even greater when you are trying to sanctify your acts in the eyes of your girlfriend in order to assure her continued cooperation and participation.

At the very least, evaluation of reliability must be accomplished on both levels of the hearsay statements admitted at trial through Sullivan. Not only must Sullivan's reliability be tested but the reliability of Lefkowitz must also be reviewed. To say that the evidence elicited in this manner was neither crucial nor devastating is to dramatically overstate the government's case.

For these reasons it becomes imperative to establish criteria to assure focus by the trial court on the reliability issue. That is, if the intent of the Court in Dutton is to safeguard Sixth Amendment rights through a careful analysis of reliability, clarification and refinement of the principles articulated must be given.

II

REFINEMENT OF THE DUTTON STANDARD IS NECESSARY TO RESOLVE DIVISION AMONG THE CIRCUIT COURTS

Attempts by circuit courts to define and implement the Dutton reliability standards have produced conflicting results. The leading Ninth Circuit decision in this area, Snow v. United States, 521 F2d 730 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976) all but ignores the "crucial

and devastating" aspect of the Dutton test. And, in spite of decisions in the Second, Fifth and Tenth Circuits, confusion abounds.

In the Second Circuit, for instance, Dutton requirements are reduced, in most cases, to finding the declaration to have been made in furtherance of the conspiracy, "[A]lthough the holding in Dutton is apparently not sui generis, its scope is uncertain in view of both the facts of the case and other recent decisions." United States v. Puco, 476 F2d 1099, 1103 (2nd Cir. 1973).

Contrary to the avoidance by the Ninth Circuit and confusion of the Second, the approach taken by the Fifth and Tenth circuits is enlightened. The Fifth Circuit--from which Dutton emanated--held that where hearing evidence is admitted the record must affirmatively show those inducia of the statement's reliability and trustworthiness which in turn serve as adequate substitutes for the right of cross-examination. Hoover v. Beto, 467 F2d 516, 533 (5th Cir. 1972).

When this issue was addressed by the Tenth Circuit in United States v. Roberts, 583 F2d 1173 (10th Cir. 1978) a "laundry list" approach was used. Unlike the Ninth Circuit in Snow, the Tenth Circuit highlights "crucial" and "devastating" criteria and also seems to require specific findings--a concept arguably at the heart of the Dutton mandate.

The only thing clear from Dutton and its progeny in the circuits is that nothing is clear. The circuit courts have been unable to piece together an integrated picture of this Court's concept of reliability.

In the case at bar, this confusion can be seen in the trial court's avoidance of the issue and the rather summary opinion issued by the Ninth Circuit. That Sullivan's testimony was both "crucial" to the government's case and "devastating" to Babic is easily seen in light of the weak and inconsistent testimony of Fisher.

Taken alone, Fisher's report of the sequence of events is as consistent with good practice by Babic, the attorney, as it is with culpability. Only after the introduction of Lefkowitz's statement as interpreted and related by Sullivan does Babic's role become tainted.

The Court should note that the re-written records did not exculpate, a fact which Babic, as a former Special Agent, would realize and which the laymen, Lefkowitz and Fisher, would not appreciate. The amateurish plan could not have been professionally orchestrated.

As an attorney, Babic must be responsible for advice given Lefkowitz, his client. It is wholly unfair and prejudicial, however, to permit fabrications by Lefkowitz to become primary

evidence against Babic without giving Babic an opportunity to expose his client's motivation and deceit through cross-examination.

III

THE STANDARD FOR DETERMINATION OF RELIABILITY MUST BE GREATER THAN MERE PREPONDERANCE OF THE EVIDENCE

As a preliminary hurdle to the admission of hearsay statements under the co-conspirator exception, the government must establish that a conspiracy existed, that the declarant made the statement during the conspiracy and that the statement was made in furtherance of the conspiracy. The import of the third requirement, furtherance, is to prevent admission of statements which satisfy the first two requirements but which are still unreliable. Obviously, however, the degree of protection afforded by these requirements depends entirely upon the standard by which the government must establish the preliminary facts.

If a "prima facie" standard is to be used guarantees of reliability provided by the requirements are too dilute. Several commentators have suggested that the preliminary determination be made at least at the preponderance level. Garland and Snow, The

Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements, 63 J. Crim. L.C. & P.S. 1, 8 (1972). [One authority even suggests the proper standard to be the level of criminal proof--beyond a reasonable doubt. Saltzburg, Standards of Proof and Preliminary Questions of Fact, 27 Stanford Law Review 271, 303 (1975)]. Under this standard, the judge would at least have to determine whether evidence establishing each of the preliminary facts was more convincing than evidence to the contrary.

By natural extension, it is arguable that the standard of review for the determination of reliability itself would be at least at the level of preponderance of the evidence. If this standard is less stringent than the one applied to the threshold factors, effective guarding of Sixth Amendment rights would be lost.

There is no indication in the trial court decision or in the opinion of the Ninth Circuit Court of Appeals that any such standard of review was utilized in this case. And, even if the preponderance standard had been used, it is probable that the government would be unable to meet its burden of proof regarding the reliability of Lefkowitz.

Any lesser consideration than that described above unduly burdens the attorney-client relationship by

forcing counsel to be almost paranoid about any contact with clients. Obviously this argument is not intended to suggest in any manner that attorneys should be able to knowingly participate in the transmittal of false evidence or any other improprieties. However, the process to determine when such improprieties have occurred must be embarked upon with strict security to protect and preserve the function of legal counsel which lies at the heart of due process.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 79-1231
v.	)	DC CR 78-758
EDWARD W. BABIC, Defendant-Appellant.	)	MEMORANDUM

Appeal from the United States District Court for the Central District of California

Before: DUNIWAY, CHOY AND SCHROEDER, Circuit Judges.

Babic was convicted, after a non-jury trial, of conspiracy to defraud the Internal Revenue Service (IRS), 18 U.S.C. § 371, and of aiding and assisting the preparation and presentation of fradulent documents to the IRS, 26 U.S.C. § 7206(2). We affirm.

Contentions on Appeal

Babic contends that (1) hearsay testimony linking him to the conspiracy was improperly admitted under Fed. R. Evid. 801(d)(2)(E) because (a) there

was no independent proof of the conspiracy, and (b) the hearsay statements were not made in furtherance of the conspiracy; (2) his Sixth Amendment right of confrontation was denied because the hearsay declarant was not available for cross-examination; and (3) excluding the hearsay testimony which the court had admitted, there was insufficient evidence to convict him of conspiracy.

We reject the first two contentions, and thus need not reach the third.

Admission of the Hearsay Testimony

Invocation of Fed. R. Evid. 801 (d)(2)(E) requires (1) independent evidence sufficient to support a finding of the existence of a conspiracy, and (2) evidence of at least a slight connection between the defendant and the conspiracy. E.g., United States v. Testa, 548 F.2d 847, 853 (9th Cir. 1977); see United States v. Dunn, 564 F.2d 348, 356-57 (9th Cir. 1977). Once these prerequisites are met, out-of-court statements by co-conspirators are admissible if they were made in furtherance of the conspiracy. See United States v. Eubanks, 591 F.2d 513, 519-20 (9th Cir. 1979).

The independent evidence sufficient to support a finding of the conspiracy need not be direct evidence; the conspiracy may be inferred from circumstantial evidence. E.g. United States v. Turner, 528 F.2d 143, 162 (9th Cir.),

cert. denied, 423 U.S. 996 (1975). Here, there was overwhelming evidence establishing a conspiracy, including direct and mutually supporting evidence from several witnesses, and indirect evidence in the form of IRS records. Babic's attack on the credibility of certain of these witnesses is out of place here. It is for the trial court alone to determine witness credibility.

Viewing, as we must, the evidence in the light most favorable to the government, there was also non-hearsay evidence (for example, the direct testimony of the other conspirators) sufficient to establish at least a slight connection between Babic and the conspiracy.

The admitted out-of-court statements were in furtherance of the conspiracy: they were made by co-conspirator Lefkowitz to induce another (Sullivan) to join the conspiracy and to further the conspiratorial objectives. See United States v. Eubanks, 591 F.2d at 520.

Rule 801(d)(2)(E) was properly invoked, and the out-of-court statements were properly admitted.

Babic's Right of Confrontation

Babic charges a violation of his Sixth Amendment right because the declarant of the admitted out-of-court statements was not available for cross-examination. The test for such a violation is "whether, 'under the

circumstances, the unavailability of the declarant for cross-examination deprived the jury [or, as here, the judge,] of a satisfactory basis for evaluating the truth of the extra-judicial declarations.' (citation omitted)" United States v. Snow, 521 F.2d 730, 734 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976).

Four factors to be considered in this determination are (1) whether the declaration contained no assertion of past fact; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether the declarant was possibly relying on faulty recollection; and (4) whether the circumstances under which the statement was made provide reason to believe the declarant had misrepresented the defendant's involvement in the crime. Id., citing Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (plurality opinion).

Here, the declarant was the organizer and "hub" of this "wheel-type" conspiracy, and knew better than anyone Babic's involvement therein; the declarations, being of contemporaneous facts, do not suggest faulty recollection on the part of the declarant; and the circumstances under which the declarations were made do not provide any particular reason to doubt the declarant's veracity.

Because the challenged evidence implicating Babic in the conspiracy was properly admitted, we need not reach Babic's contention that, without it, the evidence is insufficient.

AFFIRMED.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

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OCTOBER TERM, 1979

EDWARD W. BABIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Statement 2

Argument 4

Conclusion 11

CITATIONS

Cases:

California v. *Green*, 399 U.S. 149 6

Dutton v. *Evans*, 400 U.S. 74 ..... 5, 6, 7, 10

Hoover v. *Beto*, 467 F. 2d 516, cert. denied, 409 U.S. 1086 10

Ottomano v. *United States*, 468 F. 2d 269, cert. denied, 409 U.S. 1128 ..... 7, 10

United States v. *Johnson*, 575 F. 2d 1347, cert. denied, 440 U.S. 907 10

United States v. *Lekowitz*, No. 79-1328 (9th Cir. Jan. 31, 1980) 2

United States v. *Papia*, 560 F. 2d 827 ..... 7, 10

United States v. *Puco*, 476 F. 2d 1099, cert. denied, 414 U.S. 844 10

United States v. *Roberts*, 583 F. 2d 1173, cert. denied, 439 U.S. 1080 10

United States v. *Snow*, 521 F. 2d 730, cert. denied, 423 U.S. 1090 10

Page

Constitution, statutes and rule:

United States Constitution, Sixth Amendment 4, 5, 7

18 U.S.C. 371 2

18 U.S.C. 1001 2

26 U.S.C. 7201 2

26 U.S.C. 7203 2

26 U.S.C. 7206(1) 2

26 U.S.C. 7206(2) 2

Fed. R. Evid. 801(d)(2)(E) 5, 10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

There is no opinion of the trial court. The memorandum opinion of the court of appeals (Pet. App. A-1 to A-5) is not reported; the affirmance of the conviction is reported at 614 F. 2d 777.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1980. The petition for a writ of certiorari was filed on February 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied his right of confrontation by the admission into evidence of the out-of-court statements of one of his co-conspirators.

STATEMENT

Petitioner was convicted on December 6, 1978, after a non-jury trial in the United States District Court for the Central District of California, of conspiring to defraud the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371, and of aiding and assisting in the presentation of fraudulent documents to the IRS, in violation of 26 U.S.C. 7206(2). The indictment on which petitioner was convicted charged that petitioner and one Albert M. Lefkowitz,[1] together with others, had conspired to prepare and present to the IRS false and fraudulent cash records for N/U Rent-A-Car, to conceal the existence and whereabouts of various business records that had been summoned by the IRS, and to cause the company's bookkeeper, Lloyd M. Fisher, an unindicted co-conspirator who actually prepared the false cash records, to leave the United States and travel to Canada in order to make his testimony unavailable to the IRS (C.T. 2-3).[2] The indictment also charged that petitioner aided and assisted in the preparation and presentation to the IRS of false and fraudulent cash receipts and cash disbursements journals for N/U Rent-A-Car.

Petitioner, an attorney and former IRS Special Agent, was given concurrent four-year terms of probation on each count, with the requirement that he spend six months in a jail-type institution, pay a fine of $2,500, and perform 200 hours of voluntary community service.

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[1]Lefkowitz was also convicted after a non-jury trial of violating 18 U.S.C. 371 and 1001, and 26 U.S.C. 7201, 7203, and 7206(1), and was sentenced to four years' imprisonment and three years' subsequent probation. The court of appeals affirmed in an opinion that is not yet reported. *United States* v. *Lefkowitz*, No. 79-1328 (9th Cir. Jan. 31, 1980).

[2]"C.T." references are to the Clerk's Transcript of Record.

The following facts were established by the evidence at petitioner's trial. Lefkowitz was president of N/U Rent-A-Car and petitioner was an attorney representing the corporation (R.T. 133-135).[3] On June 12, 1975, IRS agents went to the corporate office, told Lefkowitz that he and the corporation were under investigation for possible violations of the tax laws, and served a summons upon him calling for production on June 23, 1975, of the corporate records for 1971 through 1974 (R.T. 20-22). Thereafter, petitioner, Lefkowitz and Fisher met to discuss the IRS summons. Lefkowitz expressed concern that the 1973 records would show that large amounts of cash had been withdrawn from the business (R.T. 79). Fisher jokingly suggested burning the records and then, pursuant to the request of Lefkowitz, agreed to rewrite the books (R.T. 79-81). On June 23, petitioner, Lefkowitz and Fisher met with the IRS agents and represented that the summoned records did not exist or had been lost or destroyed (R.T. 23, 84-85). The date of July 14 was set for the production of whatever records could be found by then (R.T. 25). On that date, the agents were given the rewritten corporate books for 1973 (R.T. 25-26, 30, 86).

Prior to July 14, Fisher had expressed concern over the fact that many of the source documents for the original records sought by the IRS remained in the corporate office (R.T. 82-83). On June 28, 1975, Lefkowitz, Fisher, Patricia Sullivan (a secretary employed by the corporation and Lefkowitz's girlfriend), and two others moved numerous corporate records to Sullivan's apartment and Lefkowitz's home (R.T. 83-84). Subsequently, on November 17 and 18, 1975, the IRS

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[3]"R.T." references are to the Reporter's Transcript of Proceedings.

obtained these records through the execution of two search warrants (R.T. 32-33).

On November 20, 1975, Lefkowitz told Fisher that he had just talked with petitioner and that they thought it would be best for Fisher to leave the country for a period of time (R.T. 89). Fisher, using a car given to him by Lefkowitz, went to Vancouver, British Columbia, where he remained through the end of December 1975 (R.T. 89-92).

ARGUMENT

Petitioner contends (Pet. 6-14) that certain testimony of Patricia Sullivan relating out-of-court statements made to her by Lefkowitz violated petitioner's Sixth Amendment right of confrontation. There is no merit to this claim.

The trial court found that Sullivan joined the conspiracy on June 28, 1975, the day she testified she had helped Lefkowitz and Fisher move certain corporate records from the offices of N/U Rent-A-Car to various other locations, including Sullivan's apartment (R.T. 223, 138-139). Sullivan first testified to a conversation between Lefkowitz and herself at Sullivan's apartment on the morning the records were moved, stating (R.T. 139):

> He [Lefkowitz] told me prior to the time we went to the office that he had had a conversation with Mr. Babic [petitioner] early in the week and a discussion had come up about these records, and Mr. Babic [petitioner] was very upset that they still existed and wanted them destroyed. However, Mr. Lefkowitz feld [*sic*] he needed them to continue to conduct his business, therefore he was only going to move them, and we might as well get it done that day.

She then recounted a conversation between Lefkowitz and herself in mid-November of 1975, several days after the IRS had served and executed the search warrants to obtain records from the corporate offices and Lefkowitz's house; "He [Lefkowitz] told me that Mr. Babic [petitioner] had asked him who at this point could hurt him and he said only Mr. Fisher, and Mr. Babic [petitioner] then says, 'Get him out of town' " (R.T. 141).

Petitioner does not argue, nor could he, that this testimony was inadmissible hearsay evidence. The out-of-court declarations of Lefkowitz were properly admissible as the statements of a co-conspirator made during the course and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). Rather, citing *Dutton* v. *Evans*, 400 U.S. 74 (1970), petitioner argues that the admission of Lefkowitz's statements to Sullivan violated petitioner's Sixth Amendment right to confront the witnesses against him because Lefkowitz did not take the stand and submit to cross-examination.

In *Dutton*, the Court considered the limitations imposed by the Confrontation Clause of the Sixth Amendment through the Fourteenth Amendment upon a state's evidentiary rule governing the admissibility of hearsay. The Court held that the admission of testimony in that case concerning an out-of-court declaration by someone who did not testify did not violate defendant Evans's right of confrontation. In a plurality opinion joined by three other members of the Court, Mr. Justice Stewart acknowledged (400 U.S. at 86) that "the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots" but declined to

equate the two.[4] In concluding that the Confrontation Clause was not violated by the admission of the testimony of one Shaw concerning a statement by one of Evans's alleged accomplices (Williams) that appeared to implicate Evans in the offense charged, Mr. Justice Stewart distinguished the case on various grounds from others in which Sixth Amendment violations had been found (400 U.S. at 87); and, observing that the "mission" of the Confrontation Clause was to assure that " 'the trier of fact [has] a satisfactory basis for evaluating the truth' " of the out-of-court statement (400 U.S. at 89, quoting *California* v. *Green*, 399 U.S. 149, 161 (1970)), he considered four "indicia of reliability" of the out-of-court statement at issue.[5] He concluded that the admission of the statement was constitutional despite the fact that the declarant did not appear at trial and submit to cross-examination.

Because this Court has never found a Confrontation Clause violation where disputed statements were admitted under the federal co-conspirator's exception, which is narrower than the exception concerned in *Dutton* (400

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[4]Mr. Justice Harlan, concurring in the result (400 U.S. at 93-100), was of the view that the Sixth Amendment placed no constraints on rules governing the admission of hearsay. Rather, he concluded that the Fifth Amendment due process guarantee was the applicable standard and that Evans's claim was properly rejected so long as adequate procedures were provided.

[5]Those indicia are (1) whether the statement contained no express assertion about past fact and thus would not be likely to be assigned great weight by a jury; (2) whether the out-of-court declarant would have personal knowledge of the offense involved and the participants; (3) whether circumstances indicated that the declarant was not relying on faulty recollection; and (4) whether the circumstances did not suggest that the declarant might have misrepresented matters (400 U.S. at 88-89).

U.S. at 81), it is arguable that the "reliability" tests need not be applied at all. See *United States* v. *Papia*, 560 F. 2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F. 2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Nonetheless the court below cited (Pet. App. A-4) the four "indicia of reliability" from the *Dutton* plurality opinion in concluding that the admission of Lefkowitz's statements through Sullivan's testimony did not violate the Sixth Amendment.[6] Petitioner does not directly challenge the court's application of the standard derived from the *Dutton* plurality opinion; rather he asserts (Pet. 6-9) that the standard is in need of "refinement" and that under the refined standard he would prevail on his Sixth Amendment claim. He also asserts (Pet. 9-12) that this Court should grant review to resolve a conflict among the circuits concerning the proper standard. These contentions are without merit.

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[6]Specifically the court of appeals observed (Pet. App. A-4):

> [T]he declarant was the organizer and "hub" of this "wheel-type" conspiracy, and knew better than anyone * * * [petitioner's] involvement therein; the declarations being of contemporaneous facts, do not suggest faulty recollection on the part of the declarant; and the circumstances under which the declarations were made do not provide any particular reason to doubt the declarant's veracity.

The fact that Lefkowitz was himself purporting to quote another declarant does not make this a more difficult case than *Dutton*, since the third declarant was petitioner himself. Petitioner was free to take the stand to deny or explain any of the statements attributed to him, and he did in fact do so, denying his involvement in or knowledge of the activities to which Lefkowitz's statements linked him (R.T. 236-287). Thus petitioner's assertion (Pet. 8) that this case involves "double hearsay" adds nothing to his claim.

Petitioner is vague about the refinement he is proposing, but he appears to suggest that the admission against a defendant of out-of-court statements by a nontestifying co-conspirator should always be held violative of the Confrontation Clause either where those statements are deemed "crucial" or "devastating" (Pet. 8) or where the reliability of the out-of-court statement is not proved by a preponderance of the evidence (Pet. 12-14).[7] Whatever the merits of petitioner's suggestions, this is not the case in which to consider them.

Direct evidence of petitioner's statements and activities, introduced through the testimony of Lloyd Fisher, the company bookkeeper who actually prepared the false records, established by more than a preponderance of the evidence the reliability of the statements concerning petitioner's role in the scheme that Sullivan attributed to Lefkowitz.[8] And by the same token, given Fisher's testimony, those statements quoted by Sullivan were

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[7]Although the heading for petitioner's argument on this point states that "The Standard for Determination of Reliability Must Be Greater Than Mere Preponderance of the Evidence" (Pet. 12), he does not, in fact, appear to argue for a higher standard.

[8]Petitioner's suggestion (Pet. 8) that Lefkowitz's statements should be deemed unreliable because he had a "motive for fabrication" (calming the fears of a co-conspirator by suggesting that the proposed scheme had the "sanction" of an attorney's approval) rests on a mischaracterization of Sullivan's testimony concerning those statements. The statements of Lefkowitz as reported by Sullivan would hardly serve to ease any trepidations about moving the records, for Lefkowitz represented that petitioner was "very upset" about the continuing existence of the records (R.T. 139). Similarly, Lefkowitz's report that Babic counselled getting Fisher out of town (R.T. 141) was not calculated to ease fears, since Lefkowitz explained that Fisher "could hurt" Lefkowitz.

clearly not "crucial" to the government's case, as petitioner contends. Fisher testified that he, Lefkowitz, and petitioner participated in a meeting at which Lefkowitz suggested that the records be rewritten (R.T. 78-80, 114-115). Fisher also testified that he met with petitioner on two occasions, attempted to discuss his progress on the rewriting of the records, and complained to petitioner about security problems, including the fact that the source documents from which the original records had been made were still in the corporate offices. Fisher testified that he asked petitioner to talk to Lefkowitz about the security problems (R.T. 81-83, 120). Fisher further testified that a few days after the false records were submitted to the IRS, petitioner asked him at lunch whether the records submitted to the IRS could create problems, and he replied that only the rewritten 1973 cash journals could be a problem (R.T. 87). Fisher testified that he met with petitioner after the IRS seized the original records which had been secreted and expressed his alarm that the IRS had both the original and rewritten books. According to Fisher's testimony, petitioner told him not to worry and that it would work out all right (R.T. 88-89). Then, Fisher testified, Lefkowitz told him on November 20, 1975, that petitioner and Lefkowitz thought it would be best if Fisher were to leave the country for a while (R.T. 89). Fisher subsequently left for Vancouver, British Columbia, with the assistance of Sullivan and Lefkowitz (R.T. 88-91).

In view of Fisher's testimony, Sullivan's testimony concerning Lefkowitz's remarks linking petitioner to the scheme can hardly be considered "crucial," as petitioner contends (Pet. 8). Nor, in view of the fact that this was a non-jury trial, can the admission of the testimony be

considered "devastating" to petitioner's defense. The trial judge was perfectly capable of assigning the hearsay testimony the weight it deserved.

Petitioner is correct in asserting that the circuits are divided as to the constitutional standard applicable to the admission of out-of-court declarations of nontestifying co-conspirators, but he is incorrect in suggesting that this is an appropriate case in which to resolve the split. Several circuits, including the First and Seventh Circuits, have held that a statement admissible under Fed. R. Evid. 801(d)(2)(E) *ipso facto* satisfies the requirements of the Confrontation Clause under *Dutton* v. *Evans*, *Ottomano* v. *United States*, *supra*; *United States* v. *Papia*, *supra*. The court below applied a rule more favorable to defendants in following *United States* v. *Snow*, 521 F. 2d 730, 734-735 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976), which applies the *Dutton* tests to statements admissible under the federal co-conspirator's exception. Contrary to petitioner's contentions (Pet. 10), the Second, Fifth, and Tenth Circuits have applied the same reliability standards, derived from *Dutton*, as the Ninth Circuit. See, *e.g.*, *United States* v. *Roberts*, 583 F. 2d 1173, 1175-1176 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *United States* v. *Puco*, 476 F. 2d 1099, 1104 (2d Cir.), cert. denied, 414 U.S. 844 (1973); *Hoover* v. *Beto*, 467 F. 2d 516, 533 (5th Cir.), cert. denied, 409 U.S. 1086 (1972).[9]

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[9]In *United States* v. *Johnson*, 575 F. 2d 1347 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979), a case decided after *Hoover* v. *Beto*, *supra*, on which petitioner seeks to rely, the Fifth Circuit appears to have adopted a flat rule that testimony admissible under Fed. R. Evid. 801(d)(2)(E) does not violate the Confrontation Clause.

Because petitioner obviously could not benefit from application to his case of the rule followed by the First and Seventh Circuits, there is no occasion here for the Court to review the question on which the circuits are divided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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